HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER.

PRIORITY OF SUBSEQUENT CREDITORS OVER A MORTGAGE. — When a quasi-public corporation has been put into the hands of a receiver, two general classes of unsecured claims may be preferred to those secured by a mortgage of corporate assets: viz., liabilities incurred by the receiver or his agents; and certain antecedent obligations of the corporation, which fall into three groups: (1) claims arising out of the operation of the business, such as wages, rents of leased property and price of rolling stock;[1] (2) claims contracted in preserving the property;[2] and (3) under extraordinary circumstances claims for money used in improving the property.[3] The reason for preferring debts due from the receiver is evident. He is an officer of the court; his liabilities are the liabilities of the court; and the court protects itself by expressly requiring that all obligations created by him in the duties of his office shall be paid first.[4] But the ground for giving priority to claims arising before the receiver is appointed is not so apparent. Since such preferences have been confined to cases of receivership of quasi-public corporations, it has been suggested that judicial discretion to impose conditions in appointing a receiver,[5] or the interest of the public in having the business continued, furnishes the justification.[6] It must

[1] Taylor *v.* Phila., etc., R R. Co., 7 Fed. Rep. 377.
[2] Lee *v.* Penn Traction Co., 105 Fed. Rep. 405.
[3] Claims for personal injuries are not preferred. Farmers', etc., Co. *v.* Detroit, etc., Co., 71 Fed. Rep. 29.
[4] See opinion of Lord Turner in Morrison *v.* Morrison, 7 De G. M. & G. 214, 226. So claims arising from the receiver's negligence are preferred. Cowdrey *v.* Galveston, etc., R. R. Co., 93 U. S. 352.
[5] Farmers', etc., Co. *v.* Kansas City, etc., Co., 53 Fed. Rep. 182.
[6] Union, etc., Co. *v.* Illinois, etc., Co., 117 U. S. 434.

be clear, however, that judicial discretion should be exercised, not at the caprice of the chancellor, but on equitable principles; and that the interest of the public can be no excuse for impairing the obligation of the mortgagee's contract or for depriving him of his security without due process of law. The rule finds its strongest support in the analogy from admiralty where claims for seamen's wages, salvage, and repairs are given priority over the mortgage lien.[7] In all three groups of cases where preferences are permitted, as in these admiralty cases, the debts are based upon considerations which have resulted in direct benefit to the mortgagee; and it is believed that the true principle underlying the decisions is the equitable doctrine of unjust enrichment. Where the subsequent creditor preserves or increases the value of the security, the law implies a promise by the mortgagee to allow such creditor priority.

It must be admitted, however, that some cases will not square with this theory. For example, the United States Supreme Court recently refused to give preference to a claim arising from the preservation of the road, and distinguished such claims from those incurred in its operation. *Gregg* v. *Metropolitan Trust Co.*, U. S. Sup. Ct., March 6, 1905. Furthermore, there is a wide conflict of authority as to the time before the appointment of a receiver within which claims must have accrued in order to receive preference. Some cases leave the matter to the discretion of the court,[8] while others fix the limit variously at a reasonable time,[9] six months,[10] or the period of the statute of limitations.[11] If the ground on which the preference is given is the unjust enrichment of the mortgagee, the right to the preference should vanish only when the benefits are no longer appreciable at the time the receiver is appointed.[12] The situation is analogous to that where money is deposited in a consciously insolvent bank. The depositor is preferred so long as the deposit can be traced in the increased assets of the bank. And finally, if this theory of quasi-contract were logically applied there would be no reason for limiting the rule allowing preferences to cases where a receiver is appointed and the corporation is a quasi-public one.[13]

PERFECTING AN INCHOATE RIGHT AS A PREFERENCE. — Bankruptcy Acts usually provide that transfers of property made within a prescribed period before the filing of the petition in bankruptcy shall be deemed preferences if they result in giving to one creditor a greater portion of his debt than to other creditors of the same class. Under what circumstances a creditor can perfect within such period an inchoate right previously acquired has been the source of much conflict under early bankruptcy legislation. It was comparatively simple to require that the property should not be obtained by an

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[7] The Feronia, L. R. 2 A. & E. 65.

[8] Central, etc., Co. *v.* East Tennessee, etc., R. R., 80 Fed. Rep. 624.

[9] Wood *v.* N. Y., etc., R. Co., 70 Fed. Rep. 741.

[10] Rutherford *v.* Penn., etc., R. R. Co., 178 Pa. St. 38. See Fosdick *v.* Schall, 99 U. S. 235.

[11] Brandenstein *v.* Way, 17 Wash. 293.

[12] See Hale *v.* Frost, 99 U. S. 389.

[13] Merchants' Bank *v.* Moore, 106 Ala. 646 (limited to quasi-public corporations). See Bound *v.* South Carolina Ry. Co., 47 Fed. Rep. 30 (applied only when mortgagees ask for a receiver).